

In The

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-728

RONALD A. DIPAOLO,

Petitioner,

v.

JAMES P. MITCHELL (FORMERLY WALTER M. RIDDLE) WARDEN, VIRGINIA STATE PENITENTIARY;
WILLIAM H. POWELL, SHERIFF, SUSSEX COUNTY,
VIRGINIA; and JAMES D. SWINSON, SHERIFF,
FAIRFAX COUNTY, VIRGINIA,

Respondents.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION
TO GRANTING OF WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This Supplemental Brief is respectfully submitted pursuant to Rule 24(5) of the *United States Supreme Court Rules* and prays for denial of the petition for a Writ of Certiorari under authority of *Molinaro v. New Jersey*, 396 U.S. 365, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970), because petitioner is a fugitive from justice.

RELEVANT OPINIONS AND ORDERS BELOW

The Order of the United States District Court below revoking petitioner's federal bail and ordering petitioner to surrender himself to state authorities forthwith to serve his state sentence is unreported but is contained in the Appendix to the Petition. (Cert. App. C at 5a). The Order of the District Court denying reconsideration and directing its prior order into execution forthwith is unpublished but is also set forth in the Appendix to the Petition. (Cert. App. D at 9a).

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue a Writ of Certiorari is grounded upon 28 U.S.C. § 1254(1).

This Supplemental Brief in Opposition to Granting of Writ of Certiorari is filed pursuant to Rule 24(5) of the *United States Supreme Court Rules*.

QUESTION PRESENTED

Should this Court consider a petition for writ of certiorari when the petitioner is a fugitive from justice who flagrantly violated the terms of his release on bail and the federal court order which directed him to surrender to state authorities forthwith?

STATEMENT OF FACTS

On February 5, 1976 petitioner was released on federal bail pending the Commonwealth's appeal from the judgment of the United States District Court in Alexandria, Virginia, granting a writ of habeas corpus. The United States Court of Appeals for the Fourth Circuit vacated that

judgment and remanded the case for further consideration, upon which the United States Court, on January 5, 1977:

ORDERED that the Petition for Writ of Habeas Corpus be denied; the order of this Court letting the petitioner to bail be revoked; and the petitioner surrender himself to the Virginia authorities forthwith for the serving of the sentence imposed by the Circuit Court of Fairfax County, Virginia. (Cert. App. at 5a).

Petitioner's counsel sought reconsideration of that order, but on January 17, 1977, the motion to reconsider was denied and the prior order of January 5 was "ordered into execution forthwith." (Cert. App. at 9a).

Unknown to respondents' counsel until January 11, 1979, the petitioner violated the aforesaid orders of the United States District Court, copies of which orders were only "mailed to counsel." Respondents' counsel was never advised by anyone that petitioner had failed to comply and "surrender himself to the Virginia authorities forthwith."

By happenstance and informal telephonic inquiry by respondents' counsel late in the afternoon of January 11, 1979 to the Bureau of Records of the Virginia Department of Corrections (to determine at which particular state or local facility petitioner was currently confined) indicated that petitioner was not in custody. Further investigation on the morning of January 12, 1979 confirmed that petitioner was not in custody but was a fugitive from justice. It was also learned for the first time from telephonic inquiries to the Offices of the Clerk of the District Court, the United States Marshal and the United States Attorney in Alexandria that, without the knowledge of respondents' counsel and without notice to respondents' counsel, on July 22, 1977 the District Court below ordered the bond forfeited on motion of the United States because of petitioner's failure to appear. Unfortunately, while respondents' counsel was under the im-

pression that petitioner had complied with the District Court's order to surrender, in fact petitioner was and remains in fact a fugitive from justice in direct contempt and flagrant violation of the specific orders of the United States District Court.

ARGUMENT

Aside from the fact that respondents' counsel inexplicably was not informed about either petitioner's violation of the court order to surrender and of the subsequent bail forfeiture proceedings in the United States District Court, it is clear that petitioner is not entitled to call upon the resources of this Honorable Court for determination of his claims and that his petition for writ of certiorari should be denied.

In *Molinaro v. New Jersey, supra*, a state prisoner whose conviction was being appealed to this Court was released on bail. He subsequently failed to surrender himself to state authorities and was a fugitive from justice. This Court opined that:

No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. In the absence of specific provision to the contrary in the statute under which Molinaro appeals, 28 USC § 1257(2), we conclude, in light of the Smith and Bonahan decisions, that the Court has the authority to dismiss the appeal on this ground. The dismissal need not await the end of the Term or the expiration of a fixed period of time, but should take place at this time.

There is no provision in 28 U.S.C. § 1254(1), to preclude application of Molinaro.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the respondents in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 22nd day of January, 1979, I mailed three copies of the foregoing supplemental brief for the respondents in opposition to the granting of a writ of certiorari to John Kenneth Zwerling, Esquire, 108 North Columbus Street, Post Office Box 383, Alexandria, Virginia 22313, counsel of record for petitioner.

JERRY P. SLONAKER

Assistant Attorney General